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In The OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1994

PHILIP W. CLEMENTS and SHIRLEY F. CLEMENTS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the time for appeal from a federal district court order under FRAP 4(a)(1) begins to run from the date of issuance of an order of the court where:

(a) The order is issued by the district court judge;

(b) The order is not designated as a judgment;

(c) A judgment is not issued on a separate document; and

(d) The clerk does not enter a judgment.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Citations ii

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Writ 6

I. The appeals court decision appears to conflict with decisions of this Court and the appeals court itself. 6

Conclusion 12

TABLE OF CITATIONS

Cases Cited:

Bankers Trust v. Mullin, 453 U.S. 381, 98 S. Ct. 1117 (1978) 7, 8, 9

Coleman v. Block, 562 F. Supp. 1353 (D.N.D. 1983), 580 F. Supp. 192 (D.N.D. 1984) 2

Contents

Page

Curry v. Block, 541 F. Supp. 506 (S.D. Ga. 1982), *aff'd*, 738 F.2d 1556 (11th Cir. 1984) 2

Freeman v. Shalala, 2 F.3d 552 (5th Cir. 1993) 8, 9, 10, 11

Gray v. Secretary of Health and Human Services, 3 F.3d 1584 (9th Cir. 1993) 8

Huecker v. Milburn, 1538 F.2d 1241 (6th Cir. 1976) 8

Richland Trust Company v. Federal Insurance Company, 480 F.2d 1212 (6th Cir. 1973) 8

Shalala v. Schaefer, __ U.S. __, 113 S. Ct. 2625 (1993) ... 6, 7

United States v. Indrelunas, 411 U.S. 216, 93 S. Ct. 1562, 36 L. Ed. 2d 202 (1972) 7, 8

United States v. Kimball Foods, Inc., 440 U.S. 715 (1979) 2

Rules Cited:

Federal Rule of Appellate Procedure 4(a) 1, 2, 6

Federal Rule of Appellate Procedure 4(a)(1) ..... i, 6

Federal Rule of Civil Procedure 54(b) 10, 11

Federal Rule of Civil Procedure 58 .....1, 2, 6, 8, 9, 10, 11

Federal Rule of Civil Procedure 60 1

Contents

Page

Statutes Cited:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1345 1

Other Authority Cited:

9 J. Moore, *Federal Practice* ¶ 110.08(2), p. 120 (1970) .. 7

APPENDIX

Appendix A — Order of the United States Court of Appeals for the Sixth Circuit Filed September 12, 1994 ..... 1a

Appendix B — Opinion of the United States Court of Appeals for the Sixth Circuit Filed July 27, 1994 ..... 3a

Appendix C — Declaration of Judgment in the United States District Court, Western District of Michigan, Southern Division Filed June 13, 1994 ..... 8a

Appendix D - Order of the United States District Court, Western District of Michigan, Southern Division Dated May 24, 1993 ..... 10a

Appendix E — Order of the United States District Court, Western District of Michigan, Southern Division Filed December 7, 1992 ..... 14a

Contents

Page

Appendix F — Order to Vacate in the United States District Court for the Western District of Michigan, Southern Division Dated August 19, 1992 ..... 16a

Appendix G — Excerpts of Proceedings of Show Case Hearing Dated August 12, 1992 ..... 18a

Petitioners Philip W. Clements and Shirley F. Clements respectfully pray that a writ of certiorari be issued to review the *per curiam* judgment and opinion of the United States Court of Appeals for the Sixth Circuit issued in the above proceeding July 27, 1994.

OPINIONS BELOW

The opinion of the court of appeals of which review is sought (App. B, p. 3a) is reported at 32 F.3d 569 (6th Cir. 1994). That opinion held that the petitioners' appeal to the United States Court of Appeals from the order of the district court (App. F, p. 16a) was not timely. The district court order is not reported. The Court of Appeals' September 12, 1994 order (App. A, p. 1a) denying the petition for rehearing and suggestion for rehearing *en banc* is not reported.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was entered on July 27, 1994. (App. B, p. 3a). The petition for rehearing and suggestion of rehearing *en banc* was denied September 12, 1994. (App. A, p. 1a). On November 29, 1994, Justice Stevens enter an order extending petitioners' time to file this petition to and including February 9, 1995. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the district court was invoked under 28 U.S.C. § 1345.

STATUTORY PROVISIONS INVOLVED

This case involves the relationship between FRAP 4(a) and FRCP 58 and 60.

STATEMENT OF THE CASE

A writ of certiorari is requested in this case to allow this Court to review the court of appeals' opinion (App. B, p. 3a) which determined that the district court's Order to Vacate entered August 19, 1992 (App. F, p. 16a) constituted a final judgment pursuant to FRAP 4(a) and FRCP 58, thus rendering untimely the petitioners' appeal. A brief summary of the background facts and the proceedings follows.

For more than quarter century, Philip W. and Shirley F. Clements, husband and wife, operated a mink farm in Mecosta County, Michigan. In 1976, the Clements' received a loan from the Farmers Home Administration (FmHA), an agency within the United States Department of Agriculture. FmHA was created by Congress as the federal government's "lender of last resort" to administer loan programs which have been determined by this court to constitute a "form of social welfare." *United States v. Kimball Foods, Inc.*, 440 U.S. 715 (1979); *Curry v. Block*, 541 F. Supp. 506 (S.D. Ga. 1982), *aff'd*, 738 F.2d 1556 (11th Cir. 1984); *Coleman v. Block*, 562 F. Supp. 1353 (D.N.D. 1983), 580 F. Supp. 192, 194 (D.N.D. 1984).

In 1982, a lienholder senior to FmHA foreclosed on the Clements' farm property which served as security for the FmHA loan. FmHA was the successful bidder at the foreclosure sale. Under Michigan law, the Clements were entitled to a one year redemption period following the sale. Prior to the expiration of the one year redemption period provided under Michigan law, the Clements filed a Chapter 13 bankruptcy. The bankruptcy court confirmed a plan pursuant to which the Clements were to make installment payments totalling $120,700 to FmHA during the plan period.

The Clements made a total of $61,095 in payments to FmHA

under the plan, but eventually fell behind in the required payments. The government moved to dismiss the bankruptcy; the bankruptcy court denied the motion and held that the petitioners' FmHA debt was still outstanding, apparently with no credit applied for the proceeds from the foreclosure sale. A subsequent dispute then arose between the parties concerning fee ownership of the property; FmHA claimed title to the property as the successful bidder at the sale and, eventually, commenced this litigation in the district court asserting its claimed title and seeking an order requiring the Clements to vacate the property. The Clements disputed the government's claim of title to their farm, arguing that the Chapter 13 plan had essentially effected a financed redemption of the property. The Clements also asserted in the district court that, when they became delinquent on their plan payments, FmHA failed to comply with various federal statutes and regulations governing servicing and restructuring of delinquent FmHA farm loans. (App. G, p. 25a).

On August 12, 1992, the district court conducted a show cause hearing on the government's request for an order directing the Clements to vacate their farm. In an oral opinion issued from the bench, the court ruled that FmHA held title to the property and that the Clements were to vacate the farm within ninety days. (App. G). However, on the basis of defenses asserted by the Clements and argument presented by their counsel at the hearing, the court also granted the Clements the opportunity to file a motion during the ninety day eviction period for reconsideration of the court's decision to order that the property be vacated.

The court entered a written "Order to Vacate" August 19, 1992. (App. F, p. 16a). No separate judgment document was entered by the court or the clerk.

The petitioners filed a motion for reconsideration November 10, 1992, supported by substantial briefing. The court received

the motion and, on December 4, 1992, set a briefing schedule on the motion for both parties, noting that "[T]he Court does want to be informed of the government's position on the substantive issues." (App. E, p. 14a). However, the district court subsequently entered an order May 24, 1992 denying the petitioners' motion for reconsideration on the grounds that it was filed untimely. (App. D, p. 10a).

The petitioners filed their notice of appeal to the United States Court of Appeals for the Sixth Circuit June 17, 1993. (App. B, p. 5a). One year later, on June 13, 1994, while the petitioners' case was pending in the Court of Appeals, the district court entered a "Declaration of Judgment." (App. C, p. 8a). In that "Declaration", the court stated, *inter alia*:

> It having hereby come to the court's attention that a "judgment order" making clear that the court's August 19, 1992 order effectively adjudicated the only claim before the court, was never entered;
>
> * * *
>
> On the Court's own motion, It Is Hereby Declared, *nunc pro tunc*, that the August 19, 1992 order of the Court is the Court's award of judgment. JUDGMENT in favor of plaintiff and against defendants on the claim stated in the complaint.

(App. C, p. 9a). In a footnote to this "Declaration of Judgment", the court noted that the order "effects merely a technical completion of the record." (App. C, p. 9a).

On appeal, the court of appeals declined to review the merits

of the petitioners' claims and held that the court lacked jurisdiction because the petitioners' notice of appeal was filed too late to challenge the district court's order to vacate the farm property. (App. B, p. 6a). In its order, the appeals court declared that the district court's August 19, 1992 "Order to Vacate" (App. F, p. 16a) "was indeed a final order" (App. B, p. 6a) since the district court had expressly declared it to be so nearly two years later in its Declaration of Judgment *nunc pro tunc* filed June 13, 1994.

The appeals court dismissed the petitioners' appeal on the merits for lack of appellate jurisdiction. At the same time, however, the court accepted jurisdiction and affirmed the district court's order denying the "Motion for Reconsideration" on the ground that it was not timely filed after issuance of the "final order" of August 19, 1992. (App. B, p. 7a).

On September 12, 1994, the court of appeals denied the Clements' petition for rehearing and suggestion of rehearing *en banc*. (App. A, p. 1a).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in this case appears to be in direct conflict with a prior decision of this Court and with prior decisions of the court of appeals itself governing entry of judgment under FRCP 58 and "finality" of orders for appeal under FRAP 4(a). *Shalala v. Schaefer*, ___ U.S.___ , 113 S. Ct. 2625 (1993). The question raised in this petition is thus of great importance to the bench, bar and litigants in the Sixth Circuit.

I.

THE APPEALS COURT DECISION APPEARS TO CONFLICT WITH DECISIONS OF THIS COURT AND THE APPEALS COURT ITSELF.

The court of appeals decision appears to be in direct conflict with this Court's unanimous decision in *Shalala v. Schaefer*, *supra*, which held that a district court order is not a "final judgment" for purposes of FRAP 4(a)(1) unless it has been entered in compliance with FRCP 58 and is set forth on a separate document. *Shalala*, p. 2632.

In *Shalala*, the Court established a bright-line test for entry and finality of district court judgments:

> Rule 4(a) of the Federal Rules of Appellate Procedure establishes that in a civil case . . . *the time for appeal does not end* until 60 days after "entry of judgment," and that a judgment is considered entered for purposes of the rule *only if it has been "entered in compliance with* Rule 58 . . . of the Federal Rules of Civil Procedure."

(Emphasis added).

> Rule 58 requires a district court to set forth every judgment "on a separate document" and provides that "[a] judgment is effective only when so set forth." See *United States v. Indrelunas*, 411 U.S. 216, 220, 93 S.Ct. 1562, 1584, 36 L.Ed.2nd 202 (1973) (*per curiam*).

Shalala, p. 2632, citing *United States v. Indrelunas*, 411 U.S. 216, 220, 93 S. Ct. 1562, 1564, 36 L. Ed. 2d 202 (1972) (*per curiam*).

In *Bankers Trust v. Mullin*, 453 U.S. 381, 98 S. Ct. 1117 (1978), the Court discussed the "separate document" requirement of Rule 58 in detail, and articulated the reason for the rule:

> The separate-document requirement was thus intended to avoid the inequities that were inherent when a party appealed from a document of docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an earlier document or docket entry had been the judgment and dismiss the appeal as untimely. *Bankers Trust*, 55 L.Ed.2d 357, page 361-362.
>
> * * *
>
> [I]t must be remembered that the rule is designed to simplify and make certain the matter of appealability. It is not designed as a trap for the inexperienced. . . . *The rule should* be interpreted to prevent the loss of *the right of appeal*, not to facilitate loss.

Bankers Trust, 453 U.S. 381, page 385, quoting 9 J. Moore, *Federal Practice* ¶ 110.08(2), p. 120, n. 7 (1970).

In *Bankers Trust*, the Court found that only very narrow circumstances could excuse rigid application of the rule. There, the Court found that a separate document was not required because (a) the district court had clearly evidenced its intent that the opinion and order would constitute the final decision of the case; (b) a judgment of dismissal had been entered by the clerk; and (c) the parties did not object to entry of final judgment without a separate document.

The United States Court of Appeals for the Sixth Circuit has acknowledged and adopted the "separate document" standard under FRCP 58. In *Richland Trust Company v. Federal Insurance Company*, 480 F.2d 1212 (6th Cir. 1973), the court held that it lacked jurisdiction where the requirement of Rule 58 had not been met. *Accord, Huecker v. Milburn*, 1538 F.2d 1241 (6th Cir. 1976), *citing Indrelunas* and *Richland Trust Company, supra. See also, Freeman v. Shalala*, 2 F.3d 552 (5th Cir. 1993); *Gray v. Secretary of Health and Human Services*, 3 F.3d 1584 (9th Cir. 1993).

In this case, the district court did not enter a Rule 58 judgment at the time its oral opinion was announced from the bench August 12, 1992 (App. G, p. 18a) nor when it entered the "Order to Vacate" August 19, 1992. (App. F, p. 16a). Indeed, in its August 12, 1992 oral opinion, the court solicited a motion for reconsideration from the petitioners and set a ninety day period of time for execution of its order. (App. G, p. 25a). And, on December 4, 1992, after receiving the petitioners' Motion for Reconsideration, the court entered a further order establishing a briefing schedule for the parties stating that "[T]he Court does want to be informed of the Government's position on the substantive issues." (App. E, p. 14a). Surely, the court's direction to the parties did not suggest "finality" of the court's August 12 or 19, 1992 orders; to the contrary, the court expressed a clear intention of revisiting the merits of the petitioners' defenses to the government's eviction suit.

On May 24, 1993, the district court then mysteriously reversed itself when it entered its "Order Denying Motion for Reconsideration." (App. D, p. 10a). There, while acknowledging its earlier order receiving the motion and establishing a briefing schedule, the court held that the motion had been untimely filed. Again, no separate judgment document was entered by the court pursuant to FRCP 58.

The district court appears to have finally acknowledged the FRCP 58 requirement, but not until June 13, 1994, nearly one year after the Notice of Appeal was filed in the court of appeals. On that date, the court entered its "Declaration of Judgment" (App. C, p. 8a) acknowledging that a "judgment order . . . was never entered," explaining that the court wished to "dispel any ambiguity in or confusion about" the August 19, 1992 order and stating that it was now entering the order *nunc pro tunc* to "effect a technical completion of the record." (App. C, p. 9a).

Surely, the "Declaration of Judgment" issued by the district court June 13, 1994 cannot simply travel in time to a day nearly two years before and serve as an effective notice to the petitioners that the court's August 19, 1992 order was intended to be a final judgment. This is just the kind of "trap" envisioned by the Court in *Bankers Trust, supra*, and not an application of the rule which will effect the purpose of the rule stated there — "to prevent the loss of the right of appeal." *Bankers Trust v. Mullin*, 453 U.S. 381, at 385. Just as the district court admitted the "ambiguity and confusion" caused by the lack of a separate judgment document in August 1992 and the court's continuing exercise of jurisdiction over the case thereafter, the petitioners were equally entitled to be confused about the court's intentions. Since the district court did not enter a judgment as required by *Shalala* August 19, 1992 — and in fact did not do so until June 13, 1994 — it follows that the Clements' notice of appeal was timely.

The court of appeals thus erred when it decided it did not have jurisdiction to hear the Clements' appeal on the merits of their defenses to the government's eviction since, if anything, the appeal lodged June 14, 1993 may have been premature, not untimely. (When the district court entered its order denying Motion for Reconsideration, May 24, 1993, it again failed to issue or have entered a separate judgment document as required by Rule 58 and *Shalala*.) (App. D, p. 10a). Nonetheless, the court of appeals *accepted* jurisdiction in respect to the Clements' appeal of the May 24, 1993 order, even while asserting that it did not have jurisdiction over the appeal with respect to the August 19, 1992 order. This contradiction is not consistent with *Shalala*, FRCP 58 or the general rule that:

> [A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims . . . shall not terminate the action as to any of the claims . . . and the order or other form of decision is subject to revision at any time before entry of judgment adjudicating all the claims. . .

FRCP 54(b).

FRCP 54(b) provides the authority and mechanism in the Rules allowing a district court to "split" a case to allow an immediate appeal of one matter or part of the case, while retaining jurisdiction over another. Here, while the court certainly could have entered a "Rule 54(b) Judgment" in respect to its August 19, 1992 order, and then entertained and considered the matters raised in the Clements' Motion for Reconsideration, it did not. Rather, the court left the entire case open until — eight months later — it declared the Motion for Reconsideration untimely and — nearly two years later *nunc pro tunc* — declared its August 19, 1992 order to have been its final judgment.

The court of appeals did not explain how — in the absence of a judgment properly issued pursuant to FRCP 54(b) in respect to the August 19, 1992 Order to Vacate — it could exercise jurisdiction over part, but not all, of the Clements' appeal. *Shalala*, FRCP 58 and FRCP 54(b) suggest that there is no explanation. It follows that the appeals court either had jurisdiction over the entire appeal — including the Clements' defenses on the merits to the government's eviction action — or that it had no jurisdiction at all since the district court had not, with the exception of the "time-travelling" Declaration of Judgment *Nunc Pro Tunc*, ever issued a final judgment consistent with *Shalala* and FRCP 58.

CONCLUSION

The petitioners' appeal to the Sixth Circuit was not untimely. The petitioners — Midwest family farmers who are fighting to preserve more than a quarter-century of their hard work — should not be "tricked", by "confusion and ambiguity" recognized by the district court itself, into losing their only and last opportunity to appeal on the merits of their defense against the government's seizure of their farm. The writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED SEPTEMBER 12, 1994

No. 93-1887

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PHILIP W. CLEMENTS; SHIRLEY F. CLEMENTS,

Defendants-Appellants.

ORDER

BEFORE: JONES and RYAN, Circuit Judges; and BERTELSMAN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

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* Hon. William O. Bertelsman, Chief Judge United States District Court for the Eastern District of Kentucky sitting by designation.

considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk se

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JULY 27, 1994

NOT RECOMMENDED FOR PUBLICATION

Case No. 93—1887

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATED OF AMERICA,

Plaintiff-Appellee

v.

PHILLIP W. CLEMENTS,
SHIRLEY F. CLEMENTS,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

BEFORE; JONES, RYAN, Circuit Judges, and Bertelsman, Chief District Judge.*

PER CURIAM. Defendants-Appellants Philip W. and Shirley F. Clements appeal the district court's determination that

* The Honorable William O. Bertelsman, Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

the Plaintiff-Appellee United States is the rightful owner of a disputed parcel of real property, its order that Defendants vacate the property, and its denial of Defendants' motion to reconsider. We find that our jurisdiction over this matter extends only to the motion to reconsider. We further find that the district court did not abuse its discretion in denying this motion, and so we affirm.

I.

Since 1968, Defendant have run a mink farm on a parcel of property in Mecosta County, Michigan. In 1976, they obtained a loan through the federal Farmers Home Administration ("FmHA"). In 1982, the first priority lienholder, the First National Bank of Evart, foreclosed on the property. FmHA purchased the property at the foreclosure sale for $127,348.62, which included a $79,948.38 payment to the Evart bank.

Under Michigan law, Defendants had one year from the date of the sale to redeem the property. On the day that the one year period expired, they filed for Chapter 13 bankruptcy. During the course of the bankruptcy proceeding, the bankruptcy court determined that Defendants could redeem their property by paying $120,700 to the FmHA via installment payments. Over the next four years, Defendants paid $61,095.88 of the amount they owed the FmHA, but fell behind in making payments. In 1988, FmHA moved to dismiss Defendants' Chapter 13 plan for failure to make payments. In 1989, the bankruptcy court denied FmHA's motion, holding that Defendants' debt to FmHA was not discharged, and that FmHA retained all of its rights and remedies against them.

Defendants sought relief from the National Appeals staff of FmHA, which ruled that the bankruptcy did not render the 1982

foreclosure sale ineffective. The FmHA state director affirmed that FmHA was indeed the owner of the property.

In January, FmHA send Defendants a notice of eviction. In May, it sent a second letter ordering that Defendants vacate the property by June 28, 1991. When Defendants refused to do so, the United States initiated the present suit seeking an order to vacate the premises.

On August 19, 1992, the lower court held that the FmHA was the rightful owner of the property. The court ordered Defendants to vacate within 90 days. The court recognized that Defendants had raised claims that FmHA had violated certain federal regulations, but had not tied these claims to the question of whether an order to vacate should be issued. Consequently, the court invited Defendants to file a motion to reconsider that would more fully present these claims, noting that the 90 day period gave the court ample time to consider the claim without prejudicing either party, so long as the motion to reconsider was filed promptly.

Rather than filing their motion promptly, however, Defendants filed it just one week shy of the end of the 90 day period they had been granted in which to vacate the property. The motion to reconsider did not specify whether it was submitted pursuant to Rule 59 or Rule 60 of the Federal Rules of Civil Procedure, so the court considered it under both rules. In May 1993, the court denied the motion, holding that it was untimely under Rule 59(e), and that it did not seek relief based upon any of the reasons that are cognizable under Rule 60.

Defendants filed their notice of appeal on June 17, 1993, nearly 10 months after the district court's entry ordering them to vacate the disputed property.

Appendix B

II.

Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides that, where the United States is a party, the appellant has 60 days in which to file a notice of appeal "after the date of entry of the judgment or order appealed from." The failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988); *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993).

Defendants ask us to consider whether the district court erred in its Order of August 19, 1992, by determining that the United States was the rightful owner of the disputed property. However, Defendants filed their notice of appeal too late to challenge this Order. Thus, we lack jurisdiction to consider the issue.

Defendants argue that the August 19, 1992 order was not a final order, and that the court's only final order was issued on May 24, 1993, when the court denied Defendants' motion for reconsideration. However, not only do the two entries in question make it clear that the August 19, 1992 order was indeed a final order, *see* J.A. at 13, 52-55, but also the district court expressly declared that the August order was a final order in a Declaration of Judgment *nunc pro tunc* filed on June 13, 1994.[1]

Defendants further allege that the August Order was "held

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1. The Declaration states that "the August 19, 1992 order of the Court is the Court's award of JUDGMENT in favor of plaintiff and against defendants on the claim stated in the complaint." In a footnote, the district court clarified that "[t]his order is not intended to alter the substantive rights and duties of the parties in any way, but effects merely a technical completion of the record."

under advisement pending resolution of the Appellants' motion for Reconsideration." Reply Br. at 3. It is true that, on December 4, 1992, the court held under advisement the United States' request for a *writ of assistance* to forcibly remove the Clements from the property. J.A. at 50. However, this did not affect the status of the August order. Defendants' unsupported claim to the contrary is meritless.

III.

The only remaining issue is whether the district court improperly denied Defendants' motion for reconsideration. On appeal, Defendants contend that this motion was filed pursuant to Rule 60(b)(6). Rule 60(b)(6) is available only to give extraordinary relief as a means of achieving substantial justice when the other enumerated grounds of Rule 60(b)'s first five clauses are not applicable. *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989). A trial court has "especially broad" discretion with regard to granting or denying relief pursuant to Rule 60(b)(6). *Id.*

The court below briefly considered that Defendants' motion may have been brought pursuant to Rule 60, and held that it did not seek relief based on "any reason cognizable under" this rule. This was not an abuse of discretion. Nothing in Defendants' motion indicates that they merit such extraordinary relief or that issues of substantial justice are implicated here.

IV.

For the foregoing reasons, the district court's denial of Defendants' Rule 60(b)(6) motion to reconsider is affirmed, and the remaining issues raised by Defendants are dismissed for lack of jurisdiction.

APPENDIX C — DECLARATION OF JUDGMENT IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED JUNE 13, 1994

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:92-CV-85

HON. DAVID W. McKEAGUE

UNITED STATES OF AMERICA,

Plaintiff,

v.

PHILIP W. CLEMENTS and SHIRLEY F. CLEMENTS,

Defendants.

DECLARATION OF JUDGMENT

The Court having issued an order dated August 19, 1992, requiring defendants to vacate certain premises, such order having granted plaintiff United States substantially all the relief demanded in its complaint; and

The Court having subsequently denied defendants' motion for reconsideration on May 24, 1993; and

The Court having denied defendants' motion for stay on June 28, 1993; and

Appendix C

It having newly come to the Court's attention that a "judgment order" making clear that the Court's August 19, 1992 order effectively adjudicated the only claim before the Court, was never entered; and

The Court wishing to dispel any ambiguity in or confusion about the character of the Court's August 19, 1992 order; now, therefore,

On the Court's own motion, IT IS HEREBY DECLARED, *nunc pro tunc,* that the August 19, 1992 order of the Court is the Court's award of JUDGMENT in favor of plaintiff and against defendants on the claim stated in the complaint.[1]

Dated: June 13, 1994

s/ David W. McKeague
DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE

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1. The Court has continuing authority to issue this order, notwithstanding the pending appeal of this matter, as an order in aid of the appeal. *See* 9 Moore's Federal Practice, 2nd ed., ¶203.11. This order is not intended to alter the substantive rights and duties of the parties in any way, but effects merely a technical completion of the record.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED MAY 24, 1993

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:92-CV-85

HON. DAVID W. McKEAGUE

UNITED STATES OF AMERICA,

Plaintiff,

v.

PHILIP W. CLEMENTS and SHIRLEY F. CLEMENTS,

Defendant.

ORDER DENYING MOTION FOR RECONSIDERATION

On August 19, 1992, this Court issued an order to vacate, requiring defendant to vacate premises occupied by them not later than November 10, 1992. On November 10, 1992, defendants filed a motion for reconsideration, raising issues and argument not formerly presented in defense of their continued occupation of the subject premises. The Court thereupon established a supplemental briefing schedule, which has been completed. The Court now considers the motion for reconsideration based on the written filings without the benefit of an additional hearing.

Appendix D

A brief review of the procedural history of this case is in order. Plaintiff United States commenced the action in January 1992, by filing a complaint to obtain possession of property owned by it, but occupied by defendants, in Barryton, Mecosta County, Michigan. Defendants have been engaged in mink fur farming operations there since 1968. On August 27, 1982, the United States, acting through the Farmers Home Administration, obtained title to the property by purchasing it at a foreclosure sale.

In conjunction with the complaint, the United States petitioned for and obtained an order requiring defendants to show cause for their refusal to surrender possession of the property in writing by April 6, 1992. On April 6, 1992, defendants filed a motion for enlargement of time within which to file their show cause brief. The requested enlargement of time, to May 11, 1992, was granted. The show cause brief was timely filed and a show cause hearing was conducted on August 12, 1992.

At the conclusion of the hearing, the Court ruled that the United States had demonstrated the validity of its title and that defendants had failed to present a meritorious defense to the claim for possession. Accordingly, the Court ordered defendants to surrender possession within 90 days. Anticipating that defendants might move for reconsideration, the Court expressly cautioned them that the filing of such a motion would not automatically suspend the operation of the order to vacate. The Court therefore urged defendants to file any such motion at the earliest possible opportunity.

Defendants' motion for reconsideration was filed on the last day of the 90-day period within which they were to have vacated the property. It is supported by a 35-page brief. The main thrust of

the motion is to the effect that the United States should be equitably estopped from enforcing its title, because the Farmers Home Administration, in violation of its own regulations, failed to make loan servicing options available to them that would have enabled them to reasonably meet their debt obligations while maintaining their business. This argument was alluded to, but not developed at the show cause hearing.

Defendants' motion does not address a clerical mistake made by the Court and does not seek relief from the Court's order because of mistake, excusable neglect or newly discovered evidence or any other reason cognizable under Fed. R. Civ. P. 60. It must be treated as a motion to alter or amend the Court's order under Fed. R. Civ. P. 59(e). Rule 59(e) expressly provides that such a motion "shall be served not later than 10 days after entry of the judgment." The Court has no discretion, no power to enlarge this period. Fed. R. Civ. P. 6(b). The ten-day period is jurisdictional and cannot be waived by the parties or the Court. *Winston Network Inc. v. Indiana Harbor Belt R.R. Co.*, 944 F.2d 1351, 1362 (7th Cir. 1991); *Kraus v. Consolidated Rail Corp.*, 899 F.2d 1360, 1362 (3rd Cir. 1990). Defendants' motion , filed on the 83rd day after entry of the order to vacate, is not timely. The Court has no alternative but to deny the motion.[1,2]

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1. It is noteworthy that defendants have not even sought an enlargement of time, within the ten-day period after entry of the order to vacate or otherwise. Nor have they shown their tardiness to be attributable to excusable neglect or other good cause. Their dilatoriness is particularly perplexing in light of the Court's explicit instruction to defendants at the show cause hearing to file any contemplated motion for reconsideration at the earliest possible opportunity.

2. When the Court granted the parties leave to file supplemental briefs on the motion for reconsideration, the Court erroneously presumed it had inherent

(Cont'd)

Appendix D

Accordingly, IT IS HEREBY ORDERED that defendants' motion for reconsideration is DENIED.

IT IS FURTHER ORDERED, consistent with the Court's earlier order to vacate, that defendants shall VACATE and surrender to the United States possession of the property commonly known as 21375 60th Avenue, Barryton, Michigan 49305, and more particularly described in plaintiff's complaint, not later than June 29, 1993.

IT IS FURTHER ORDERED that the United States' request for a writ of assistance is GRANTED, which writ is issued in conjunction herewith.

Dated: May 24, 1993

s/ David W. McKeague
DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE

(Cont'd)
equitable power to consider the motion, notwithstanding its tardiness, if the grounds asserted were meritorious and compelling. Having duly reviewed defendants' motion and supporting materials, the Court would indicate in *obiter dictum* that the grounds asserted appear to be neither meritorious nor compelling. While defendants may have reason to believe that Farmers Home Administration officials have not been as indulgent and accommodating of their financial needs as they might have been, it does not appear that they denied defendants any mandatory entitlements. The officials appear to have acted within the bounds of administrative discretion. The alleged misfeasance does not, in any event, warrant invocation of equitable estoppel under the circumstances. In fact, the finality wrought by this order, although unavoidably painful to defendants, is long overdue.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED DECEMBER 7, 1992

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:92-CV-85

HON. DAVID W. McKEAGUE

UNITED STATES OF AMERICA,

Plaintiff,

v.

PHILIP W. CLEMENTS and SHIRLEY F. CLEMENTS,

Defendants.

ORDER OF THE COURT

On August 19, 1992, following a show cause hearing conducted on August 12, 1992, the Court issued an Order to Vacate, requiring defendants to vacate premises occupied by them in Mecosta County, Michigan, not later than November 10, 1992. On November 10, 1992, defendants filed a motion for reconsideration, accompanied by a 35-page brief, raising issues and arguments not formerly presented in defense of their continued occupation of the premises. The Government has responded to the motion by challenging its timeliness. In the event the Court desired a response to the substantive issues raised

in the motion, the Government has requested a period of 28 days to file its response.

The Court does want to be informed of the Government's position on the substantive issues. Accordingly, the Government shall file its supplemental response to the motion for reconsideration no later than January 23, 1993. Defendants shall file their reply, if any, not later than February 12, 1993. In the meantime, the Government's request for writ of assistance will be taken under advisement.

IT IS SO ORDERED.

Dated: December 4, 1992

s/ David W. McKeague
DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE

APPENDIX F — ORDER TO VACATE IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED AUGUST 19, 1992

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

Case No. 1:92 CV 85

Hon. David W. McKeague

UNITED STATES OF AMERICA,

Plaintiff,

v.

PHILIP W. CLEMENTS AND SHIRLEY F. CLEMENTS,

Defendants.

ORDER TO VACATE

Having reviewed the Complaint and its attached exhibits and having heard oral arguments from both plaintiff and defendants on August 12, 1992, the Court hereby incorporates by reference its oral opinion and

IT IS ORDERED that defendants Philip W. Clements and Shirley F. Clements, shall vacate the property commonly known as 21375 60th Avenue, Barryton, Michigan 49305 located in Mecosta County, Michigan and more particularly described in plaintiff's complaint within 90 days, or before November 10, 1992.

Appendix F

This Court finds that by the proofs submitted with the Complaint, the United States is the true and rightful owner of record of the property located at 21375 60th Avenue, Barryton, Michigan.

It is further ordered that if defendants have not vacated the property at 21375 60th Avenue, Barryton, Michigan on or before November 10, 1992, this Court will sign a Writ of Assistance or other appropriate order to remove the defendants from the property.

Dated: August 19, 1992

s/ David W. McKeague
HON. DAVID W. McKEAGUE
United States District Court

APPENDIX G — EXCERPTS OF PROCEEDINGS OF SHOW CASE HEARING DATED AUGUST 12, 1992

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:92-CV-85

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PHILIP W. CLEMENTS and SHIRLEY F. CLEMENTS,

Defendants.

SHOW CAUSE
BEFORE THE HONORABLE DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE
Lansing, Michigan, August 12, 1992, 1:55 P.M.

* * *

[58] THE COURT: In the matter of United States of America versus Philip W. Clements and Shirley F. Clements, the court has reviewed the complaint filed by the government dated January 31, 1992, the brief filed by the defendants dated May 11, 1992, which was filed in response to the court's order to show cause, together with the government's response to the defendant's brief dated August 4, 1992. The Court has also carefully considered the arguments that have been made on behalf of both the government and the defendants at the [59]

hearing this afternoon together with the testimony that has been offered by Defendant Philip Clements. Finally, the court has reviewed during the hearing this afternoon and during the break that we took a few minutes ago the exhibits that — or the documents, bankruptcy documents, that were relied upon by both parties in this case.

As the court understands the issues before it, they are or were threefold: First, the defendants have previously argued in this matter that a discharge that was rendered in their Chapter 13 bankruptcy by the Bankruptcy Court for the Western District resulted in a discharge of their indebtedness to the Farmers Home and thereby obviates their need to make any payments to the government and obviates or in some way then restores their legal title to this property. The court understands, based on statements of counsel this afternoon, that further examination of the bankruptcy filed has indicated that the argument was misplaced and in fact the debt from the defendants to the government was dealt with outside the bankruptcy plan pursuant to an amended plan dated February 8, 1984, and therefore the bankruptcy discharge does not serve to address the questions that are before the court this afternoon and therefore it is not necessary to further analyze the impact of the Bankruptcy Court discharge.

Secondly, the defendants argue, although not necessarily in this order, that the defendants had a right to [60] cure their default under the mortgage during the redemption period and that their right to cure was not cut off by the foreclosure sale that occurred in this case. The government responds by referring the court to a 1985 decision entitled In Re Glenn, G-l-e-n-n, 760 F.2d 1428, and argues that under the Glenn case the defendants had a duty to cure the defaults under the mortgage before the foreclosure sale and that the foreclosure sale in essence cut off that right to cure. No

party has cited the court to the cases that set forth the law prior to the Glenn decision in 1985, those cases being referred to generically in the pleadings that have been filed with this court simply as pre-Glenn cases.

In the court's examination of the Glenn decision and its application to the facts of this matter, the court finds that it does not make any difference in the outcome of this matter whether the Glenn decision or pre-Glenn decisions apply. The reason for that conclusion is that under either set of laws, the defendants failed to cure the default in the mortgage that they had with the plaintiff, and therefore whether they get the benefit of pre-Glenn case law or not, their failure to cure renders it a moot question as to which law should be properly applied in this case.

The court then turns to the third argument raised by the defendants in opposition to the government's demand for possession of the property in question. Under this argument [61] the defendants contend that the government's failure to make it clear in the proof of claim that was filed in their Chapter 13 bankruptcy action that the government was relying upon the foreclosure deed that they had obtained to this property, coupled with the fact that the government thereafter accepted payments both under and outside of the bankruptcy plan, thereby results in a waiver of the title that the government obtained by virtue of the foreclosure — of the sheriff's deed the government received at the foreclosure sale. The defendants' support for that argument is based on general principles of equitable estoppel. The court finds that argument to be misplaced as well.

In this instance there is no dispute but that the defendants were well aware of the fact that the government had obtained title to this property by virtue of the foreclosure sale, so we're not

dealing here with an instance where the government's title to the property was in any way concealed as it might otherwise have been if we were dealing with a claim of a third party who for one reason or another was aware that the government had obtained title. It appears clear from the pleadings and the arguments this afternoon that the Clements were well aware that the government had obtained title to this property by virtue of the foreclosure sale, and certainly there is even the implication through the testimony of Mr. Clements that that is the very reason that the — that this [62] particular bankruptcy proceeding was initiated by the Clements.

In essence, the defendants argue that because the government accepted payments, they now should be divested of the title that they received by virtue of the foreclosure sale. While that may or may not have been the understanding of the defendants, as Mr. Clements has testified this afternoon, pursuant to the terms of the Chapter 13 plan dated November 4, 1983, as amended on February 8, 1984, a review of the plan and the amendment to the plan indicates that that assumption that the Clements had simply is not supported by the terms of the plan itself. Furthermore, even if that assumption had been well taken, the argument fails because the defendants have failed to make the payments called for by either the original plan or the amended plan which moved this particular debt outside of the plan. If this case involved the instance of the defendants having proposed a payment plan and then having met the terms of the payment plan, the court believes that their request that title be restored to them would be absolutely well taken. Similarly, once this debt was moved outside of this plan by virtue of the amendment to the Chapter 13 plan, had they met the terms, the payment terms outside of the Chapter 13 plan, their claim to title of this property would similarly be valid. However, in this instance, regardless of

what their belief was with respect to the terms [63] and operation of the Chapter 13 plan, they did not make the payments that were called for either under the plan or outside of the plan, and therefore the court finds that the claim that the government should be divested of title under these facts is supported by neither the law nor principles of equity in this case.

Now, the claim has also been made that it is not fair that the government should retain the title to this property that they received by virtue of the foreclosure sale and retain the some $61,000 that was paid by the defendants to the government during the plan itself. In the event that the government realizes an amount from the sale of this property that exceeds the amount of the debt, including all accrued interest, taxes, and other protective advances, when combined with the payments that have been made under the mortgage, the court would find some merit in the defendant's contentions, but that does not seem to be the facts that we have before us today. Whether that becomes the facts in the future after the property is sold is a matter that the court is not in a position to speculate about here this afternoon. It does not appear fair to the court that the government would obtain the proceeds from the sale of this property together with the amounts that have been paid if those amounts exceed the amount of the debt. That, however, is a matter that is properly left for a future dispute if and when this property is sold if the [64] amount received by the government upon the sale when combined with the payments already made under the plan exceed the total amount of the debt, including interest, taxes, and other protective advances. Although Mr. Schipper was not entirely certain as to what the government's position would be in that instance, that uncertainty, in this court's opinion, does not serve to support the defendants' contention that the government should be divested of property in this case.

Appendix G

In the court's opinion, the circumstance that we are faced with here is, although perhaps somewhat unique, not a totally unique circumstance in the sense that what the defendant is contending is that if a mortgage creditor accepts any payments from the debtor during the terms of the redemption period, the mortgagee creditor has then somehow waived the title that the mortgagee creditor received by virtue of the foreclosure sale, and the court does not believe that that's the law of this state or the Western District or the Sixth Circuit.

The case of In Re Glenn relied upon by the government in this matter is instructive in terms of language from the underlying Bankruptcy Court decision that was under consideration in that case. In Re Glenn, 760 F.2d 1428 at 1438, includes a quote from the bankruptcy judge's opinion in that case that says, in part, as follows: Therefore, I would hold that upon filing the petition, the automatic stay would [65] only prevent action to recover possession, and upon completion of the plan, the default would be cured and the position of the debtor and the creditor would be the same as though the foreclosure had never occurred. If, however, the plan is not completed on dismissal, the mortgagee would have the same rights that he would have had if no Chapter 13 petition had been filed, end quote, citing 33 Bankruptcy Reporter at 32. The court reads this Bankruptcy Court opinion that's set forth within the In Re Glenn decision to say that in the normal case, if a debt is dealt with in a plan and the plan is then complied with by the debtor, title to the property would revert back to the debtor even though a foreclosure had occurred prior to the time of the filing of the bankruptcy petition. That also is certainly a logical conclusion in the sense that that is exactly why a bankruptcy action would be filed and payments would be made under the plan. If payments are made under the plan, then surely the debtor should obtain title to the property even though a foreclosure had

happened prior to the filing of the bankruptcy petition. Similarly, in a case as of this type where payments are agreed to be made outside the terms of the plan, if those payments have been made, title to the property should revert upon successful completion of those payments to the debtor that filed the plan.

The Bankruptcy Court recognized, however, that if [66] the plan was not completed upon dismissal, the mortgagee would have the same rights that he had if no Chapter 13 Petition had been filed. The court understands that to mean that the mortgagee's rights that he would have as if no Chapter 13 petition had been filed are the rights that the mortgagee obtained by virtue of the foreclosure sale. In other words, title had passed then from the mortgagor to the mortgagee subject only to the right of redemption that the mortgagee may continue to have. Admittedly, in this case we don't have an instance of a plan not having been completed on dismissal. What we do have, though, is a factually analogous situation where the debtor agreed with the mortgagee to make payments outside the plan and then for whatever reason was unable to make those payments. In that event, the court believes that the proper result is the same as that which is referred to in the decision of the Bankruptcy Court contained in the In Re Glenn decision, that being that the mortgagee, in this case the government, would have the same rights that the government would have had if no Chapter 13 petition had been filed. In this case if no Chapter 13 petition had been filed, there would be no dispute about the title to this property, the government having already obtained title to the property by virtue of the foreclosure sale.

Therefore, for the reasons set forth in this opinion from the bench, this court finds that the government's [67] petition for possession of this property should be granted.

Appendix G

We now turn to the difficult question of the terms under which possession should be delivered to the government. Mr. Clements has testified that in this instance there is an operating mink farm with a substantial number of mink on this property. The court does not believe under the facts and circumstances of this particular case that it is appropriate to order the defendants to immediately vacate this property and to surrender possession to the plaintiffs. No proofs have been offered in this instance as to what would be an appropriate period of time, however, and therefore the court will order that the defendants surrender possession of this property 90 days from today's date.

An additional claim was made during the testimony of Mr. Clements in this case that the government has violated certain regulations or rules and procedures relative to farm loan transactions of this type. Although the defendants have not tied those violations to the question of whether or not the government should retain property to — title to this property and whether or not the defendants should be ordered to vacate this property, the court is not turning its back on or oblivious to what those claims may be. The court believes, however, that if those claims are in fact valid claims, they should have been and could have been pled prior to this proceeding here today. The 90-day period the court has [68] ordered for vacation of this property should give ample period of time for the defendants to file any appropriate motion seeking reconsideration of the court's decision today based on those regulations or rules of procedure that are applicable to the Farmers Home.

I would additionally indicate for the record this afternoon, however, Mr. Cox, that if you intend to file a motion for reconsideration of this court's opinion, it should be filed at the earliest possible opportunity regardless of what time period may

be set forth in the federal rules for purposes of allowing the court to fully consider whatever additional claims that you may have that have not been fully set forth on the record. I want the record to be clear, however, that the fact that there may be a motion for reconsideration dealing with these issues of government regulations should not be construed in any way, shape, or form as an indication that those — that motion is necessarily going to be successful. I mean by that that under the circumstances of this case, the defendants should be prepared to vacate this property within 90 days and the court will not consider an extension of that time merely because a motion for reconsideration has been filed in this case.

Is there anything further this afternoon, Mr. Schipper?

MR. SCHIPPER: Nothing further, your Honor.

[69] THE COURT: Mr. Cox?

MR. COX: Nothing further.

THE COURT: Mr. Schipper, would you prepare an order that simply makes reference to the court's ruling here this afternoon and makes reference to the opinion from the bench, submit that to Mr. Cox for his review and concurrence, and that order or judgment should be filed by a week from this Friday.

There being nothing further, this matter — or this hearing this afternoon is concluded.

(Proceedings concluded at 4:12 P.M.)